

**Guidelines and Policies**  
**for Informal Fact-Finding Conferences (IFFCs)**  
**to Consider Applications for Certificates of Public Need (COPNs)**

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**Part I. General.**

**§ 1. Introduction.** Article 1.1 of Chapter 4 of Title 32.1 (Section 32.1-102.1 *et seq.*) of the Virginia Code contains law requiring the issuance of a certificate of public need (COPN) by the State Health Commissioner authorizing the development and implementation of certain medical care facilities and services, listed therein. The Administrative Process Act, Section 2.2-4000 *et seq.*, and Section 32.1-102.6 of the Code set forth administrative procedures binding the review of such applications. Additionally, the State Board of Health has adopted regulations, including those contained in Part V (sections 170 through 310) of 12 VAC 5-220, to clarify and establish additional provisions for the appropriate review of applications.

**§ 2. Purpose of this Document.** A. Due to the complex nature of the issue of public need, the often voluminous administrative record developed in relation to applications for COPNs, and the requirement that the Commissioner's decisions regarding applications for a COPN be issued within statutory time frames, the Department of Health proposes the present document to assist applicants, their counsel and agency staff, and to serve as an effective normative device that should impart predictability to the administrative process governing the review of applications for COPNs, enhance fairness and efficiency and uphold due process considerations.

B. The present document contains guidelines and policies intended to create an effective framework for an orderly and fair administrative process insofar as that process involves, from time to time, the

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convening of an informal fact-finding conference (IFFC) to consider an application for a COPN, or two or more competing applications, conducted by an adjudication officer employed by the Department. The Department intends these guidelines and policies to promote a review process that will elicit operative facts and salient considerations helpful in gauging the core issue whether public need for a proposed project exists, while remaining wholly consistent with and supplemental to applicable law and regulation. The Department will make the present document available pursuant to Section 2.2-4008 of the Code and Executive Order 21 (2002), and will distribute it, and any revision to it, in a manner reasonably designed to inform affected and interested persons.

**§ 3. Need for an IFFC.** An applicant whose proposal:

- (i) Has been recommended for denial by the Department's Division of Certificate of Public Need (DCOPN);
- (ii) Has been recommended for denial by one or more regional health planning agencies (HPAs) having jurisdiction over the application;
- (iii) Has been recommended for denial by any combination of these agencies; or
- (iv) Is being challenged by a party seeking to demonstrate "good cause" as defined in Subsection G of Section 32.1-102.6 of the Virginia Code,

and all competing applicants in a batch review cycle to which a proposal specified in items (i) through (iv), above, will be provided an opportunity to be heard at an IFFC conducted by the adjudication officer in or near the City of Richmond. *See* Subsection D of Section 32.1-102.6 of the Code.

**§ 4. Scheduling an IFFC.** A. Section 32.1-102.6 of the Code provides that IFFCs must be held between the eightieth and ninetieth days of the applicable review cycle. The date on which an IFFC is prospectively scheduled (regardless of whether such an IFFC is eventually held or not) should be determined by DCOPN after an application is accepted as complete by DCOPN and is normally set forth in the notice of acceptance of an application into an appropriate batch for review. Applicants and their counsel are advised to take notice of the scheduled IFFC date, time and place inasmuch as the law limits the Department's authority and discretion in rescheduling an IFFC.

**§ 5. Re-scheduling an IFFC; Docketing; Pre-IFFC Conference to Narrow Issues.** Administrative exigencies and agency workload may necessitate that certain actions be taken by the Department in efforts to manage and coordinate the conduct of several IFFCs in a timely manner and in accordance with due process considerations. Due to the statutory time frame referred to in § 4, above, and the likelihood that several applications will undergo review simultaneously, certain actions to manage and coordinate IFFCs may be necessary. These actions include:

- (i) The rescheduling of an IFFC by the adjudication officer, following due notice, to a date that is within the period between the eightieth and ninetieth days of the applicable review cycle and is other than that prospectively scheduled, as noted in § 4, above;

- (ii) The use of a daily docketing system involving the scheduling of IFFCs on two or more non-competing, similar or dissimilar applications, to be discussed in a time-apportioned manner on a single day. The adjudication officer reserves the right to establish time limits for an IFFC in order to ensure that all IFFCs that must be convened during the course of a given batch cycle can be convened and concluded;
- (iii) The holding of a brief, unrecorded pre-IFFC conference, by telephone or otherwise, to include the applicant or applicants, DCOPN, other parties as appropriate, and the adjudication officer, for the purpose of developing stipulated facts and analytical conclusions so as to narrow the range of issues to be discussed at an IFFC, coordinate participants' presentations, and shorten the time necessary for such an IFFC; or
- (iv) Any combination of the actions described in i, ii, and iii.

**§ 6. Participants at an IFFC.** Participants at an IFFC shall typically be limited to (i) the applicant or competing applicants, who may choose to be represented by legal counsel, (ii) a representative of an HPA having jurisdiction over the application (if the HPA's recommendation was to deny the application; *see* Subsection D of Section 32.1-102.6 of the Code), (iii), any third-party payor providing health care insurance or prepaid coverage to five percent or more of the patients in the applicant's or applicants' service area, (iv) any person showing "good cause" (as defined in Subsection G of Section 32.1-102.6 of the Code) to be a participant at an IFFC, and (v) a representative of DCOPN.

## **Part II. Filing Documents.**

**§ 7. Submission and Distribution of Filings.** A. All documents submitted by an applicant to the adjudication officer in connection with an IFFC for inclusion in the record and for consideration during the decision-making process, whether submitted before, during or after an IFFC, must be distributed to all parties presumed to be participants at an IFFC (if filed before an IFFC) and to all parties who participated at the IFFC (if filed after an IFFC). Submission and delivery by facsimile transmission, in addition to other established or reasonable means of ensuring prompt receipt, to all such parties is strongly encouraged in order to ensure timely distribution and fair notification.

B. Documents prepared by an applicant or its counsel, by an HPA or by DCOPN to summarize facts, marshal evidence and present argument should be submitted to the adjudication officer on paper and in electronic form. Brevity should be a primary consideration when drafting and submitting such documents. Such documents include discussions involving the twenty statutory considerations defining public need, discussed in § 10, below.

C. When submitting documents in electronic form, parties should prepare them as files saved in Microsoft Word, preferably with 12-point Times New Roman font, left-justified margins and few atypical formatting and stylistic features, although tables that succinctly relate comparative facts and key data are encouraged.

**§ 8. Pre-IFFC Filings.** A. An applicant, or its counsel, may choose to file documents for the purpose of facilitating a presentation at an IFFC. When an applicant chooses to do so, it should submit the

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documents to the adjudication officer and distribute them to all parties presumed to be participants at an IFFC, as discussed in § 7, above.

B. In the event that an applicant wishes to file documents for the purpose of facilitating a presentation at an IFFC and such documents relate complex facts or data to be discussed at the IFFC, the applicant should file these documents by submitting them to the adjudication officer and distributing them to all parties presumed to be participants at the IFFC so as to be received at least four days before the scheduled date of the IFFC (if such date falls on a Monday) and at least three days before the date of the IFFC (if such date falls on any other business day). The purpose of this provision is to afford the adjudication officer and participants adequate time before the IFFC to review documents that relate complex facts and data, as distinguished from documents that contain argument and general evidence and analysis, so that the IFFC may be optimally effective.

C. The adjudication officer, on his own or on a participant's motion, may limit a participant's or witness' discussion at an IFFC of complex facts and data if:

- (i) Such facts and data were not fairly and clearly explained in a document submitted and distributed before the IFFC and in accordance with § 7 and this section, and
- (ii) As determined in the discretion of the adjudication officer, discussion of the complex facts and data would work an injustice, cause unnecessary confusion or delay, or the undue surprise of a participant.

D. Documents that do not relate complex facts or data but are nonetheless intended to facilitate a presentation at an IFFC, such as summaries of witnesses' credentials, generally-available articles, letters from non-participants conveying support for a project, maps, and paper versions of documents created in Microsoft PowerPoint may not need to be filed before an IFFC, as prescribed in this section.

**§ 9. Post-IFFC Filings.** A. In the interest of coordinating a fair, orderly, timely and economical conclusion of the application review process, the adjudication officer conducting an IFFC will determine and announce before the end of an IFFC, the date upon which the record in the matter will close, and, with the agreement of the participating parties, may determine and announce any interim dates upon which post-IFFC filings shall be submitted to him and distributed to participants at the IFFC, in accordance with § 7, above. Such additional filings normally consist of, in the order in which their respective due dates are set:

- (i) Additional written information;
- (ii) Proposed findings of fact and conclusions of law; and
- (iii) Any rebuttal deemed necessary by a participant.

B. The date for closing the record must be no later than 30 calendar days following the IFFC, in accordance with subdivision E 4 of Section 32.1-102.3 of the Code. All submittals delivered before the close of the record shall become part of the record in the matter and, if delivered and distributed without

undue surprise on any participant, shall be duly considered by the adjudication officer in formulating his recommendation to the Commissioner.

**§ 10. Twenty Statutory Considerations; Brevity Encouraged.** A. Each applicant should prepare a succinct written discussion of its proposed project in direct relation to the twenty considerations defining public need, set forth in Subsection B of Section 32.1-102.3 of the Code. The staff reports prepared by an HPA with jurisdiction and DCOPN normally include or constitute such discussions, and are part of the administrative record prior to the convening of an IFFC. Each applicant is encouraged to provide such a discussion in the equivalent of no more than 20 routinely-formatted, double-spaced pages.

B. Discussions relating a project, or projects, to the statutory considerations may be submitted as part of any other submittal filed and distributed by a participant, should be titled so as to aid their clear identification, should be filed no later than the deadline for filing proposed findings of fact and conclusions of law, and, in any event, must be filed before the record closes.

C. Discussions relating a proposed project, or projects, to the statutory considerations should be submitted to the adjudication officer in written and electronic form, as discussed in § 7, above.

**§ 11. Petitions Seeking to Show Good Cause.** A. In accordance with subdivision E 3 of Section 32.1-102.6 of the Code and subsection A of 12 VAC 5-220-230, any person seeking to show good cause and, thereby, be made a participant at an IFFC may petition for such standing by delivering to the Commissioner and to the adjudication officer a written filing disclosing such person's intention, stating the grounds and providing the factual basis therefor under oath, no later than the eightieth calendar day of the batch review cycle in which the application involved was reviewed and no more than ten days after DCOPN has transmitted its recommendation to the applicant involved and to persons who have requested a copy of the DCOPN recommendation.

B. Such a petition should be distributed to the applicant and to all parties presumed to be participants at an IFFC (and an HPA if it recommended approval of the proposed project involved) in such a manner as is likely to cause prompt notice of its existence and in accordance with applicable provisions of § 7 of this document, above.

C. Such a petition must state the purported grounds and factual basis for finding good cause and should be submitted to the adjudication officer in electronic form, in accordance with § 7 of this document, above.

D. A person seeking to show good cause who has participated in a good-cause-IFFC, as discussed in § 13, below, may submit and distribute post-IFFC filings, as discussed in § 9, above, and according to any schedule agreed upon at the close of an IFFC-in-chief, as if that person had shown good cause. Such filings will be taken under advisement until such time as a determination whether good cause exists may be reached.

### **Part III. Conduct of IFFCs.**

**§ 12. Oral Presentations in General.** A. An applicant, with or without counsel at its election, may present any factual and analytical evidence and argument that is material and relevant to a subject

application and to the fundamental set of issues involved in determining whether its proposed project is likely to meet a public need. An HPA having jurisdiction and a representative of DCOPN may present factual and analytical evidence, argument and summary. The effectiveness of such a presentation may be enhanced to the degree it bears a direct relation to the twenty considerations defining public need, set forth in Subsection B of Section 32.1-102.3 of the Code.

B. Cumulative or redundant evidence, perhaps presented through the similar testimony of several witnesses, may dilute the impact of important considerations. Brevity should be a primary consideration when preparing and delivering a presentation at an IFFC.

C. An applicant's agreement to any condition on the issuance of a prospective COPN, proposed or discussed during the review process, including a condition authorized by Subsection F of Section 32.1-102.5 of the Code, should be confirmed or otherwise clearly stated by, the applicant or its counsel, at an IFFC.

D. As discussed in § 8, above, the adjudication officer, on his own or on a participant's motion, may limit a participant's discussion of complex facts or data if such facts or data have not been fairly and clearly explained in a document submitted and distributed before the IFFC and in accordance with that section.

**§ 13. Oral Presentations at a Good-Cause IFFC.** A. In the event that a party has duly and timely submitted and distributed a petition seeking to show good cause, as discussed in § 11, above, and the petition, on its face, indicates a likelihood that good cause will be shown, a brief IFFC to allow that person to present the grounds and basis for a finding of good cause (referred to for present purposes as a good-cause IFFC), will be held on the day of and immediately before an IFFC scheduled to discuss a proposed project (referred to for present purposes as an IFFC-in-chief).

B. The party seeking to show good cause may, by motion, be allowed to discuss briefly the application involved, as if the party had successfully demonstrated good cause. If the party seeking to show good cause discusses the application, the participant seeking approval of the application involved may briefly respond to, or rebut, this discussion. Such a discussion of the application by the person seeking to show good cause will be taken under advisement until such time as a determination whether good cause exists may be reached.

**§ 14. Transcript of an IFFC.** A transcript of an IFFC will be made for the purposes of aiding a possible appeal to a court of competent jurisdiction, and for reference by the parties in preparing post-IFFC filings, assuming the ability of the court reporter tasked with preparing the transcript to distribute it promptly. In the event that an IFFC-in-chief follows a good-cause-IFFC, the transcript will include the testimony elicited and argument made at both proceedings. The cost of creating a transcript will normally be divided among all participants at an IFFC.

#### **Part IV. Post-IFFC Discussions.**

**§ 15. Teleconference to Clarify Facts or Consider Conditions.** A. In the event that the adjudication officer's review of the closed record on an application or a batch of applications reveals the need for clarification of salient facts or suggests an opportunity for improving the likelihood of approval through the devising of one or more particular conditions, including those authorized by Subsection F of Section

32.1-102.5 of the Code, to be attached to the issuance of a COPN sought by an applicant, the adjudication officer may request that the IFFC participants (and an HPA in the event that it did not participate at the IFFC) take part in a brief teleconference or other meeting, and conduct such a teleconference or meeting for the purpose of clarifying facts or devising particular conditions.

B. Such a post-IFFC discussion may involve consideration of the closed record, shall be affirmatively conscribed so as not to reopen the record or to violate the prohibition on ex parte communications contained in Subsection C of Section 32.1-102.6 of the Code, and shall be concluded at a point and in a manner in the discretion of the adjudication officer.

### **Part V. Decisions.**

**§ 16. Good Cause Determinations.** A. If an IFFC-in-chief on a particular application is not already scheduled or pending when a petition seeking to establish good cause in relation to that application is received by the Commissioner, a determination whether good cause exists will be made within five days of a good-cause-IFFC.

B. If an IFFC-in-chief on an application is already scheduled or pending when such a petition is received, a determination whether good cause exists may be made at any time up to the time that a decision whether public need for the project proposed in the subject application is reached. In such a case, if the Commissioner finds that good cause exists, the content of any submissions duly and timely filed, and oral presentation made at a good-cause-IFFC by the party seeking to show good cause, may be relied upon by the adjudication officer in formulating a recommendation and by the Commissioner in reaching a decision whether public need for the proposed project under consideration exists. In such a case, a determination whether good cause exists may be issued at the same time that a decision regarding whether a proposed project meets a public need is issued.

**§ 17. Issuance of Decisions on Applications.** After receiving an adjudication officer's recommendation, the Commissioner will reach a decision whether public need for a proposed project exists and issue a decision on an attendant application within 45 days of the close of the record unless:

- (i) In the Commissioner's discretion and upon written notification to the participants pursuant to subdivision E 6 of Section 32.1-102.6 of the Code, he extends the time for review of the application for an additional 25 days beyond expiration of the 45-day period; or
- (ii) By operation of subdivision E 7 of Section 32.1-102.6 of the Code, 70 days following close of the record in the matter elapses, resulting in an application for a proposed project under consideration to be deemed approved.

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